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IN THE

Supreme Court of the United States

RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.,
Petitioner,

v.

VERIZON INTERNET SERVICES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICI CURIAE* OF MOTION PICTURE ASSOCIATION OF AMERICA, INC., CHURCH MUSIC PUBLISHERS ASSOCIATION, ASSOCIATION OF AMERICAN PUBLISHERS, INC., AFMA, ENTERTAINMENT SOFTWARE ASSOCIATION, SCREEN ACTORS GUILD, INC., DIRECTORS GUILD OF AMERICA, INC., PRODUCERS GUILD OF AMERICA, INC., WRITERS GUILD OF AMERICA, WEST, INC., THE AUTHORS GUILD, RECORDING ARTISTS COALITION, SOFTWARE & INFORMATION INDUSTRY ASSOCATION, SESAC, INC., THE SONGWRITERS GUILD OF AMERICA, PROFESSIONAL PHOTOGRAPHERS OF AMERICA, AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, BROADCAST MUSIC, INC., AMERICAN FEDERATION OF MUSICIANS, GRAPHIC ARTISTS GUILD, INC., NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL, AND AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC., IN SUPPORT OF PETITION FOR CERTIORARI

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BRIEF *AMICI CURIAE* OF MOTION PICTURE ASSOCIATION OF AMERICA, INC., CHURCH MUSIC PUBLISHERS ASSOCIATION, ASSOCIATION OF AMERICAN PUBLISHERS, INC., AFMA, ENTERTAINMENT SOFTWARE ASSOCIATION, SCREEN ACTORS GUILD, INC., DIRECTORS GUILD OF AMERICA, INC., PRODUCERS GUILD OF AMERICA, INC., WRITERS GUILD OF AMERICA, WEST, INC., THE AUTHORS GUILD, RECORDING ARTISTS COALITION, SOFTWARE & INFORMATION INDUSTRY ASSOCATION, SESAC, INC., THE SONGWRITERS GUILD OF AMERICA, PROFESSIONAL PHOTOGRAPHERS OF AMERICA, AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, BROADCAST MUSIC INC., AMERICAN FEDERATION OF MUSICIANS, GRAPHIC ARTISTS GUILD, INC., NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL, AND AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC., IN SUPPORT OF PETITION FOR CERTIORARI

Pursuant to this Court's Rule 37.1(a), the entities listed above respectfully submit this brief *amici curiae* in support of petitioner. Written consents of both petitioner and respondent to the filing of this brief have been filed with the Clerk.[1]

INTEREST OF THE *AMICI CURIAE*

Amici are a broad coalition of organizations that represent the artists, authors, songwriters, producers, publishers, and distributors of music, films, television, literature, video

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[1] In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part and no person other than *amici curiae* or their members made a monetary contribution to the preparation or submission of this brief.

games, photographic art, and computer software. Although diverse in their creative pursuits, *amici* share a common interest: their industries' survival depends on the protection of lawful intellectual property rights in the artistic works that are created, produced, and distributed by their members.

SUMMARY OF ARGUMENT

This is a case of extraordinary importance for the creative industries, for the public, and for the rule of law. The D.C. Circuit acknowledged that "[t]he stakes are large for the music, motion picture, and software industries and their role in fostering technological innovation and our popular culture." Pet. App. 16a. What impends from this decision, contrary to the plain intent of Congress, is a disaster that will undermine not only the music industry, but the motion picture, software and other creative industries, whose companies and workers contribute enormously to the economy and the culture.

The Court of Appeals not only gave the "Subpoena to identify infringer" provision of the Digital Millennium Copyright Act, 17 U.S.C. § 512(h), a tortured interpretation utterly at odds with the express intentions negotiated by the enactors. The Court of Appeals also violated established principles of construction that when, as here, Congress has enacted a compromise to balance competing interests, the resulting statute is not to be judicially dismantled, leaving only half the bargain in place. *United States* v. *Taylor*, 487 U.S. 326, 336 (1988). And the Court of Appeals further violated this Court's years of decisions that hold that copyright protections must not be held negated by technological modifications that enable substantially the same infringement techniques that Congress sought to eliminate.

This decision already is having enormous and deleterious economic effect. The cost is in dollars, jobs, and respect for law. It is an inevitable issue of construction that can be

decided authoritatively only by this Court, and the sooner it is determined, the better.

ARGUMENT

I. INTERNET COPYRIGHT PIRACY THREATENS THE CREATIVE INDUSTRIES AND UNDERMINES THE RULE OF LAW.

A. Stealing Music, Movies and Other Copyrighted Works Has Become "Epidemic."

As the District Court observed, the massive copyright piracy that is the dark side of the Internet "is well-recognized and 'has reached epidemic proportions.'" Pet. App. 92a (quoting *United States* v. *Elcom Ltd.*, 203 F. Supp. 2d 1111, 1132 (N.D. Cal. 2002)); *see also In re Aimster Copyright Litig.*, 252 F. Supp. 2d 634, 649 (N.D. Ill. 2002) (describing the "ongoing, massive, and unauthorized distribution and copying" of copyrighted works), *aff'd*, 334 F.3d 643 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 1069 (2004). Indeed, noted the District Court, piracy of copyrighted music has "skyrocketed." Pet. App. 106a.

Starting later, but rising exponentially year by year, has been the piracy of copyrighted motion pictures, which now is costing billions of dollars. Currently an estimated 400,000 to 600,000 motion pictures are illegally downloaded *every day* in the United States, and almost 20,000 unauthorized digital copies of such popular television shows as "The Simpsons" and "Alias" are unlawfully available for download on the Internet. Deloitte & Touche, *Facing Piracy* 13 (2004); Graham, *Online Trading of TV Episodes Grows*, USA Today, May 20, 2004, at 3B (citing BayTSP report).

The film industry's distress exemplifies what all copyright owners now face. As the number of users, the speed of Internet connections, and the technical capacity of personal computers have continued to increase, so, too, has the piracy. As of March 2004, 68 million adult Americans, or 55% of all

adult Internet users, have access to high-speed Internet connections either at home or at work. Fully 48 million adult Americans have broadband connections at home, an increase of 60% since March 2003. Pew Internet & American Life Project, *Broadband Penetration on the Upswing* 1 (April 2004), *available at* http://www.pewinternet.org/pdfs/PIP_Broadband04.Data Memo.pdf. High-speed Internet connections, new compression technologies, and new file-sharing programs, now let thieves download a perfect digital copy of a full-length motion picture like "The Matrix Reloaded" in about the same time it takes to watch the film. Deloitte & Touche at 13.

With ever-improving technology, the global incidence of illegal downloading of copyrighted filmed entertainment has also increased dramatically. From 2001 to 2003 the number of Internet sites known to be offering pirated motion pictures more than quadrupled—rising from 54,000 to 225,000. Lowe, *Movie Industry Arms Itself To Sink Pirates*, Sydney Morning Herald, April 14, 2004, at 3.

The most prominent and pernicious vehicles of Internet piracy are the peer-to-peer (P2P) "file-sharing" systems and services such as KaZaA and Morpheus—which respondent Verizon, to lure customers to its broadband service, brazenly *recommended to its customers by name!*[2] They serve as nothing more than high-tech piratical bazaars, offering users a staggering array of copyrighted motion pictures (many of which are still in theaters), music, television programming,

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[2] The marketing material Verizon sent prospective broadband customers stated:

> "[T]he official sites typically don't offer all music that is still selling exceedingly well in stores. *By contrast, the free sites are likely to have pretty much everything* . . . ."

Joint Appendix, Court of Appeals, at 509 (emphasis supplied). Verizon recommended Morpheus by name as an "Essential Site" for "file-sharing fiends." *Id.* at 510.

software and video games. According to one study, nearly 90% of the content offered on such services is copyrighted and distributed without permission from the copyright holder. *See A & M Records, Inc.* v. *Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001). The backers of the KaZaA "file-sharing" system brag that its file-sharing software has been downloaded over 230 million times.

Courts have held without exception or even serious dispute that *individuals who use* these file-copying services to download copyrighted works and make them available to others—the individuals whose identity petitioner seeks to learn in these proceedings—are engaged in direct copyright infringement. *See, e.g., A & M Records*, 239 F.3d at 1114; *Metro-Goldwyn-Mayer Studios, Inc.* v. *Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1034 (C.D. Cal. 2003), *appeal pending*, No. 03-55894 (9th Cir., argued Feb. 3, 2004); *Aimster*, 252 F. Supp. 2d at 652.

B. Stealing Via the Internet Threatens Major Industries and Their Employees.

As the Court of Appeals recognized, "[t]he stakes are large." Pet App. 16a. By 2001, U.S. copyright industries, some of the world's most creative, accounted for 5.24% of the GDP, amounting to $535.1 billion—an increase of over $75 billion from 1999, and for the first time exceeding 5% of the economy. S. Siwek, *Copyright Industries in the U.S. Economy: 2002 Report* 3 (2002). That same year, U.S. copyright industries achieved estimated foreign sales and exports of $88.97 billion, leading all major industry sectors, and contributing substantially and positively to the U.S. balance of payments. *Id.* at 4-5. Between 1977 and 2001, the U.S. copyright industries' share of the GDP grew more than twice as fast as the remainder of the U.S. economy (7% annually compared to 3%). *Id.* at 4. Employment in the copyright industries—including motion pictures, music and software—grew, on average, more than three times faster

(5% annually compared to 1.5%), and more than doubled to 4.7 million workers. The industries threatened by this decision provide 3.5 percent of total U.S. employment. *Id.* at 4. The U.S. motion picture industry alone employs 580,000 people. Motion Picture Association, Press Release, July 22, 2003 (citing U.S. Bureau of Labor Statistics).

Copyright piracy, however, is having an enormous destructive effect. As petitioner points out, the music industry has suffered substantial declines in sales. *See* Pet. 18. Piracy costs the video game industry more than $3 billion per year—a number on the rise as the result of high-speed Internet file-sharing. J. Calvert, *PC Gamers Admit to Piracy* (June 11, 2004), *available at* http://www.gamespot.com/news/2004/06/11/news_6100456.html. Although the music industry has been Internet piracy's leading victim so far, the impending threat is no less serious for the motion picture industry. Feature film and television are the fastest growing media on file-sharing networks. McGuire, *Internet Piracy*, Washington Post, Jan. 22, 2004. According to one independent estimate, the "epidemic," Pet. App. 92a, of Internet piracy already now costs the motion picture industry between $3 to $4 billion *per year* in lost revenue. Deloitte & Touche at 9. Such piracy can strike a motion picture—and harm its commercial success—not only in the DVD market, but even before a work is released. For example:

- In 2002 an estimated one million infringers downloaded "Star Wars: Episode 2—Attack of the Clones" from the Internet a week before it was released in U.S. theaters. Johnson, *Cybervillains*, The Guardian, May 20, 2002, at 40.
- In June 2003 an unauthorized and unfinished copy of the motion picture "The Hulk" appeared on the Internet, several weeks before the film opened in theaters. The stolen copy was an early rough cut containing primitive special effects that were to be replaced by polished visuals for the final version. The

> unfinished copy was widely disseminated throughout the Internet and the film became the target of widespread criticism in online chat rooms even before it was completed or released to the public. Kirkland, *Criminal Downloading of Movies Off the Internet and Piracy of DVDs Is Shaking the Industry to the Core*, Toronto Sun, April 13, 2004, at 48.

These are just examples of the estimated *$13.6 billion* in lost revenues that the creative industries—including music, games, and motion pictures—now suffer each year at the hands of copyright pirates. Deloitte & Touche at 9.

Such pervasive lawlessness threatens not just the direct victims of piracy—the studios, theaters, artists, authors, producers, directors, and countless individuals involved in the creation, distribution and retailing of motion pictures and other creative works—but the public as well. Copyright laws, as contemplated by the Copyright Clause, U.S. Const., Art. I, § 8, cl. 8, motivate authors, composers, and artists to invest their time and efforts in the development of new works, secure in the knowledge that they will maintain exclusive control over, and reap the rewards of, their creative expression. "[T]he ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." *Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151, 156 (1975).

> "[I]t should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."

Harper & Row, Publishers, Inc. v. *Nation Enterprises*, 471 U.S. 539, 558 (1985). But if copyright laws may be flouted, the constitutional and congressional goal is hampered or destroyed.

C. The Corrosive Effect of Widespread Internet Theft Is Heightened by the Court of Appeals' Decision.

The Court of Appeals' neutering of the statute Congress enacted to remedy this catastrophe effectively sanctions one of the greatest outbreaks of lawlessness this country has ever seen. Worse, the greatest number of those who daily steal music, motion pictures, and other copyrighted material via the Internet are young people. The lesson they are being taught is that they may take the property created by the hard work of others, and scoff at the law. It is no different than if they entered a store, helped themselves to a bag full of music CDs, DVDs, software programs and video games, and walked out without paying, and without penalty. As the Seventh Circuit observed:

> "Teenagers and young adults who have access to the Internet like to swap computer files containing popular music. . . . The swappers, who are ignorant or *more commonly disdainful of copyright* and in any event *discount the likelihood of being sued or prosecuted* for copyright infringement, are the direct infringers."

In re Aimster Copyright Litig., 334 F.3d at 645 (Posner, J.) (emphasis supplied). "[T]he refusal to redress an otherwise actionable wrong creates disrespect for the law . . . ." *Linn* v. *United Plant Guard Workers*, 383 U.S. 53, 64 n.6 (1966). "If disobeying the law has no consequences, then disobedience will become more likely." Raymond, *Penumbral Crimes*, 39 AM. CRIM. L. REV. 1395, 1424 (2002).

Congress in the Digital Millennium Copyright Act enacted a method of enforcement to restrain this lawlessness, a method that was beginning to show success.[3] After the Court

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[3] Six months after the RIAA announced that it would begin filing lawsuits against individual music downloaders, the percentage of Internet users who reported downloading music fell by 50%. *See* Pew Internet & American Life Project, *The State of Music Downloading and File-Sharing*

of Appeals' decision, however, a generation is learning that laws are made to be broken, and penalty is unlikely—indeed, that "everybody does it" and few are caught. Perhaps most disturbingly, according to a survey released last summer by an independent technology research firm, *nearly half* of all 12-to-23-year-olds reported that they had downloaded music the prior month—and half of those said they now buy fewer CDs. One-fifth of those had also downloaded a motion picture. J. Bernoff, *et al.*, *From Discs to Downloads* (Aug. 23, 2003), *available at* Forrester Research, http://www.forrester.com.

II. THE COURT OF APPEALS EVISCERATED CONGRESS'S CAREFULLY CONSIDERED REMEDY FOR INTERNET PIRACY.

A. The Court of Appeals Undid the Legislative Bargain.

The DMCA embodies a carefully balanced negotiated legislative bargain. The Internet service provider ("ISP") industry—which includes respondent—recognized that established copyright law, including contributory and vicarious infringement, exposed ISPs to enormous potential monetary liability for the infringing conduct of their customers. *See* H.R. Rep. No. 105-551 (Amended), pt. 1, at 11 (1998). ISPs asked for broad legislative immunity from damage claims arising from the infringing conduct of their users. But the software, motion picture, video game, and recording industries—the entities that were suffering, and would continue to suffer, the consequences of Internet copyright theft—pointed out that if ISPs were to be granted a free pass

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Online 6 (April 2004), *available at* http://www.pewinternet.org/pdfs/PIP_Filesharing_ April04.pdf. Fourteen percent of the 128 million American adults now online report that they downloaded music at one time, but now no longer do so. *About one-third of these former music downloaders—6 million adults—say that threat of legal actions are the reason they stopped. Id.* at 1. *See also* Pet. 27 n.18.

from infringement liability, balance and fairness required some complementary provision under which copyright owners could quickly learn the identity of, and assert claims against, the ISP customers suspected of copyright infringement.[4] As early as 1996, at least one prominent member of the ISP community, CompuServe, agreed, and had proposed that, in exchange for immunity, ISPs should become responsible both for taking down infringing works located on their servers when notified of the infringements, and in assisting copyright owners in identifying infringers. *NII Copyright Protection Act of 1995 (Part 2): Hearing Before Subcomm. on Courts and Intellectual Property, House Comm. on Judiciary*, 104th Cong. 261 (1996).

Following a lengthy negotiation process among the interested parties, the Senate in May 1998 passed S. 2037, 105th Cong. Section 202 of S. 2037, which is virtually the same as 17 U.S.C. § 512 as ultimately enacted, includes a provision entitled "Identification of Direct Infringer" that

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[4] *See Copyright Infringement Liability of Online and Internet Service Providers: Hearing on S. 1146 Before Senate Comm. on Judiciary*, 105th Cong. 45-55 (1997); *WIPO Copyright Treaties Implementation Act and Online Copyright Liability Limitation Act: Hearing on H.R. 2281 and 2280 Before Subcomm. on Courts and Intellectual Property, House Comm. on Judiciary*, 105th Cong. 22-25 (1997). As explained by an industry group representing leading software firms:

> "A matter not now addressed by the bill is disclosure of the names and addresses of infringers by the service provider. Often in conducting Internet anti-piracy cases, we can locate the source of the material as a particular site on a service provider's system, but because the Internet is essentially an environment replete with 'aliases,' we cannot determine the identity of a person."

Id. at 77 (Business Software Alliance). Likewise, the Information Industry Association urged Congress to "condition reduced liability for infringement on the access or service provider's willingness to reveal the names of users that violate copyright and to preclude repeat offenders from accessing their services." *Id.* at 177.

BEST AVAILABLE COPY

served the same function as the provision, § 512(h), at issue in this litigation. At House committee hearings, the ISP industry came out "very much in support" of the compromise legislation.[5] The House thereafter accepted the compromise as "preserv[ing] strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment." H. Rep. No. 105-551, pt. 2, at 49 (1998); *see also* S. Rep. No. 105-190, at 20 (1998) (same). Thus the DMCA, as enacted, was Congress's comprehensive attempt to combat this lawlessness while accommodating in balanced fashion the monetary liability concerns of Internet service providers like respondent. Among the keys of that balance is the section at issue in this case, 17 U.S.C. § 512(h).

In reversing the District Court and holding that Section 512(h) does not protect copyright owners after all against "peer-to-peer" (P2P) Internet piracy, the Court of Appeals cast aside the legislative compromise reflected in Title II of the DMCA. The decision leaves ISPs largely exempt from monetary liability—while stripping copyright owners of their critical half of the bargain Congress had granted them in the battle against online piracy. Such deformation of a carefully wrought negotiated statute this Court repeatedly has condemned. "In construing this compromise legislation, we must make every effort to be faithful to the balance Congress struck." *Thornburg* v. *Gingles*, 478 U.S. 30, 84 (1986). "Courts and agencies must respect and give effect to these sorts of compromises." *Ragsdale* v. *Wolverine World Wide, Inc.*, 535 U.S. 81, 94 (2002). "[R]eview must serve to ensure that the purposes of the Act and the legislative compromise it reflects are given effect." *United States* v. *Taylor*, 487 U.S. 326, 336 (1988). *Accord, e.g.*, *Mohasco Corp.* v. *Silver*, 447

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[5] *WIPO Copyright Treaties Implementation Act: Hearing on H.R. 2281 Before Subcomm. on Telecommunications, Trade and Consumer Protection, House Comm. on Commerce*, 105th Cong. 50-52 (1998).

U.S. 807, 826 (1980) ("We must respect the compromise embodied in the words chosen by Congress"); *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 461 (2002) ("The deals brokered . . . are not for us to judge or second-guess").

B. Congress Was Well Aware of and Intended To Address New Piracy Technologies.

The Court of Appeals believed that "the legislative history of the DMCA betrays no awareness whatsoever that Internet users might be able directly to exchange files containing copyrighted works." Pet. App. 14a. But that characterization is misleading, because quite demonstrably Congress anticipated technological change. The specific current P2P technology may not have been available; but the history of the DMCA shows that Congress was well aware that the technologies of piracy were constantly evolving, along with the Internet itself, and that it intended to address the problem, not some particular technical means. In treating P2P infringement technology as something utterly new and surprising, and on that basis outside the DMCA, the Court of Appeals was factually and legally far astray.

1. Although Internet copyright piracy had not yet reached the "epidemic proportions," Pet. App. 92a, that exist now, by 1997 Congress already was hearing from numerous witnesses who warned that "[c]opyright owners today lose substantial sums of money to copyright pirates." *Copyright Piracy and H.R. 2265, The No Electronic Theft (NET) Act: Hearing Before Subcomm. on Courts and Intellectual Prop., House Comm. on Judiciary*, 105th Cong. 12 (1997) (Register of Copyrights Peters).

> "The advent of digital technology has the potential to exacerbate greatly the impact of piracy. . . . As it becomes easier to transmit large amounts of data quickly over the [Internet] it becomes easier for those without a commercial stake or profit motive—. . . an Internet user

> opposed to copyright law—to inflict tremendous damage to the market for a copyrighted work."

Id. That Internet piracy predictably would manifest itself in constantly new techniques was made clear by other witnesses as well:

> "Although distributing software through [electronic bulletin boards] is the method of choice for present-day computer pirates, other computer network services are providing new means for copyright crime to occur. For example . . . [p]rograms can be sent . . . through World Wide Web sites or other programs that allow for the rapid exchange of digital information."

Id. at 17 (Assistant Attorney General DiGregory).

By 1998 there was no doubt that Internet piracy soon would also attack the motion picture industry, which warned Congress that piracy of its product, although not yet rampant, would inevitably grow along with faster copying technology:

> "Movies and videos are not much in evidence yet. That is because the audio-visual content is so rich in information that it cannot yet move easily through the digital network. The volume of flow is simply too great for some of the pipes. But we also know that our present reprieve is only temporary. The same technology that will smooth the way for legitimate delivery of video on demand over digital networks will also prime the pump for copyright pirates."

Hearing on S. 1146, at 8-9 (MPAA Senior Vice President Attaway). The head of the Business Software Alliance likewise warned that "[p]iracy of software is a major and growing problem," and warned that the Internet could "become a haven for thieves." *Hearing on H.R. 2281*, at 37-40.

2. The Court of Appeals' reasoning is, as the United States points out along with petitioner, "palpably wrong" not only for the basic reasons of textual construction set forth in the Petition. *See* Pet. 21. The Court of Appeals also ignored, and violated,

admonitions about construing copyright legislation that this Court has reiterated for years. When applying copyright legislation even to changes in technology far more sweeping than those here, this Court explained that "[w]e must read the statutory language of 60 years ago in the light of drastic technological change." *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390, 396 (1968). "When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of [its] basic purpose." *Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151, 156 (1975). *See also West* v. *Gibson*, 527 U.S. 212, 218 (1999) ("Words in statutes can enlarge or contract their scope as other changes, in law or in the world, require their application to new instances or make old applications anachronistic.")

> "While statutes should not be stretched to apply to new situations not fairly within their scope, they should not be so narrowly construed as to permit their evasion because of changing habits due to new inventions and discoveries."

Fortnightly Corp., 392 U.S. at 395 n.16 (quoting *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.*, 5 F.2d 411 (6th Cir.), *cert. denied*, 269 U.S. 556 (1925)).

III. THE COURT OF APPEALS' DECISION DESTROYS THE EFFECTIVE ENFORCEMENT THE STATUTE INTENDED.

The Court of Appeals' decision disables the statute. By the holding that 512(h) subpoenas may be issued only in cases where an infringer has posted infringing works on a service provider's Internet server, copyright owners have been robbed of the very remedy the statute was enacted to afford them, crippling their ability to combat what is now the most virulent and widespread form of online copyright infringement. As the District Court recognized:

> "There is little doubt that the largest opportunity for copyright theft is through peer-to-peer ('P2P') software, as used by the alleged infringer here. . . . Thus, under

> Verizon's reading of the Act, a significant amount of potential copyright infringement would be shielded from the subpoena authority of the DMCA. That would, in effect, give Internet copyright infringers shelter from the long arm of the DMCA subpoena power, and allow infringement to flourish."

Pet. App. 37a.

The Court of Appeals throughout ignored the fundamental canon of statutory construction that "[a]ll statutes must be construed in the light of their purpose. A literal reading of them which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purpose." *Haggar Co.* v. *Helvering*, 308 U.S. 389, 394 (1940); *see also Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-32 (1973) ("It is well established that our task in interpreting separate provisions of a single Act is to give the Act the most harmonious comprehensive meaning possible in light of the legislative policy and purpose.").

The Court of Appeals also paid no heed to the caption Congress placed on § 512(h): "Subpoena to identify infringer." "'[T]he title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute." *Almendarez-Torres* v. *United States*, 523 U.S. 224, 234 (1998) (quoting *Brotherhood of R.R. Trainmen* v. *Baltimore & O.R.R.*, 331 U.S. 519, 528-29 (1947)). "[T]he title of a statute or section can aid in resolving an ambiguity in the legislation's text." *INS* v. *National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991). By carving out P2P pirates, the D.C. Circuit has left the statute useless for its intended purpose.

Stripped of the ability to subpoena service providers for the names of individuals using peer-to-peer services to commit copyright infringement, copyright owners are left with two cruder, more costly, and ultimately ineffective options: (1) to

bring suits for contributory and vicarious copyright infringement against the providers of peer-to-peer services; or (2) to file anonymous "John Doe" suits against copyright infringers and obtain their names through subpoenas issued under the procedures of Fed. R. Civ. P. 45.

Despite some initial successes, *see A & M Records, Inc.* v. *Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003), copyright owners' attempts to utilize the former alternative so far have failed to stop the newest and most popular devices for P2P piracy. *See, e.g., Metro-Goldwyn-Mayer Studios, Inc.* v. *Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1046 (C.D. Cal. 2003) (granting summary judgment to two P2P file-copying services, rejecting claims of contributory and vicarious infringement), *appeal pending*, No. 03-55894 (9th Cir., argued Feb. 3, 2004). Nor have any of these efforts stemmed the direct infringement that each of those courts acknowledged is occurring.

"John Doe" suits are no substitute, either. Such suits have faced significant obstacles that threaten to impose substantial and unnecessary costs on both the courts and litigants. As the District Court recognized, requiring copyright owners to file "John Doe" actions simply to learn who the infringer is imposes costs that will "likely undermine the determination of copyright owners to prosecute such actions." Pet. App. 45a. Worse, the costs of such actions have just increased dramatically. Recent decisions in district courts across the country have held that copyright owners may not bring unified actions seeking the identities of numerous "John Doe" customers of a single ISP, but rather must instead sue each individual infringer separately. *See BMG Music et al.* v. *Does 1-203*, No. 04-650 (E.D. Pa. Mar. 5, 2004) (prohibiting joinder and requiring two-hundred and three separate John Doe complaints); *Interscope Records* v. *Does 1-25*, No. 6:04-CV-197-ORL-22-DAB (M.D. Fla. Apr. 27, 2004). As the District Court pointed out, "there is absolutely nothing in the

DMCA or its history to indicate that Congress contemplated copyright owners utilizing John Doe actions in federal court to obtain the identity of apparent infringers." Pet. App. 45a.

Nor are those the only difficulties. Congress in § 512(h) anticipated that identifying the wrongdoers would not only be inexpensive but quick—three times in the provision, as the District Court noted, Congress directed that the subpoena be processed in an "expeditious" manner. Pet. App. 35a. This critical feature allowed copyright owners to confront pirates who, for example, post stolen copies of films before they have been released in threaters. By the time the "John Doe" process has run its course, the prospect for the prompt and effective enforcement Congress anticipated is lost.

If the D.C. Circuit decision stands, in the place of a single subpoena to an Internet service provider like respondent Verizon, a copyright owner now must file hundreds, possibly thousands, of separate complaints and pursue hundreds, possibly thousands, of separate subpoenas. In the place of the expedited procedures of 17 U.S.C. § 512(h), copyright owners (and district courts throughout the country) must now contend with the lengthy process of pursuing third-party discovery. In the meantime, illegal copies of the latest motion pictures, sound recordings and other copyrighted works will surface on the Internet and will rapidly proliferate worldwide, causing inestimable and irreparable losses for the creative industries.

IV. THE URGENCY AND IMPORTANCE OF THIS CRIME WAVE CALL FOR CERTIORARI NOW.

A. Entire Industries Are Threatened.

This Court on several occasions has granted certiorari in order to "consider an important question under the Copyright Act." *E.g.*, *Fortnightly Corp.* (cable retransmission of television programming); *Mills Music, Inc.* v. *Snyder*, 469 U.S. 153, 163 (1985) ("to resolve . . . important question of copyright law"); *De Sylva* v. *Ballentine*, 351 U.S. 570, 572

(1956) ("great importance of these questions in the administration of the Copyright Act").

Seldom does an opinion construing a federal statute have such sweeping effect, both in terms of numbers of people affected, dollars at stake, and the future of a major American industrial sector. All of those are considerations to which this Court has looked in granting review. *E.g.*, *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297, 300 (1959) ("importance to the shipping industry"); *Commissioner* v. *Lincoln Savings & Loan Ass'n*, 403 U.S. 345, 346-47 (1971) ("importance of the issue for the savings and loan industry"); *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 185 (1963) ("importance to the investing public and the financial community"); *National Broiler Marketing Ass'n* v. *United States*, 436 U.S. 816, 820 (1978) ("importance of the issue for the agricultural community and for the administration of the antitrust laws"). *See also United States* v. *Zazove*, 334 U.S. 602, 614 n.17 (1948) ("the added potential liability under the holding of the Circuit Court of Appeals might well amount to billions of dollars"); *United States* v. *Mitchell*, 463 U.S. 206, 211 n.7 (1983) (certiorari granted because "[t]he Government has informed us that the damages claimed in this suit alone may amount to $100 million").

B. The Court of Appeals' Decision Rejects the Interpretation of the Statute by the Copyright Office.

Certiorari is all the more called for when, as here, the interpretation by the Court of Appeals contradicts that of the expert agency assigned to administer the copyright laws, indeed, the agency that was ultimately involved in the negotiation and drafting. "[T]he Copyright Office agrees with the district court's interpretation of Section 512(h)." Pet. App. 133a; *see also id.* at 142a.

> "[A]s the District Court pointed out, subsection 512(h) 'is written without limitation or restriction as to

> its application.' It does not require that a notice be delivered. Had Congress wished to limit the application of the subpoena power, it would simply have said so in the law. It did not.
>
> "The statutory text confirms the policy of compromise behind subsection 512—that copyright owners and ISPs work together to remedy infringement. Limiting the subsection 512(h) subpoena provisions as some have proposed would remove an important tool that parties need to remedy infringement efficiently in the peer-to-peer context."

Pet. App. 143a (statement of Register of Copyrights, September 9, 2003) (footnote omitted). *Cf., e.g., Yellow Transp., Inc.* v. *Michigan*, 537 U.S. 36, 38-39 (2002) (Intermodal Surface Transportation Efficiency Act); *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985) (Clean Water Act).

C. The Court of Appeals' Decision Rejects the Interpretation of the Statute by the United States.

In a case involving the very same provision of the DMCA, argued in the Eighth Circuit last week, the United States told that court that the D.C. Circuit's "analysis of the statutory language is incorrect" and "perverse" and "fundamentally alter[s]" the compromise enacted in the DMCA and eliminates "the *quid pro quo* exacted by Congress in return for immunity." Brief for the United States as Intervenor and *Amicus Curiae*, *Recording Industry Ass'n* v. *Charter Communications, Inc.*, No. 03-3802 (8th Cir., argued June 14, 2004), at 17, 18. "[W]hen Congress identified the entities that are subject to subpoenas under Section 512(h), it used unqualified language that encompasses all ISPs and embraces, rather than excludes, ISPs engaged in data transmission." *Id.* at 20. Further:

> "Although Congress may not have foreseen the specific problem of illegal peer-to-peer file transfers, it

> manifestly did anticipate the general problem of which peer-to-peer transfers are simply one instance—the problem of online copyright infringement in which an ISP serves only as a conduit."

Id. at 13-14.

D. There Is No Reason for Delay.

This petition involves a pure legal issue—whether, as the Court of Appeals held, § 512(h) by implication prevents copyright holders from obtaining subpoenas as the DMCA provided they could. That issue is not peculiar to the facts of any particular case. The same issue, as noted, is also before the Eighth Circuit (where a district court rejected the D.C. Circuit's position) and in a district court in the Fourth Circuit. But no matter how those cases are resolved, the issue will not go away so long as the D.C. Circuit's decision stands. It is national in scope and will have to be resolved by this Court. As the District Court observed, the value of copyrighted works "could plummet" under the interpretation adopted by the D.C. Circuit, by which "universal downloading could continue unabated." Pet. App. 106a. With the continuing damage to property and to the honest public, and with Americans' respect for the rule of law further diminishing every day, this Court should address this issue of fundamental importance to the Twenty-First Century now.

CONCLUSION

For the reasons stated herein and in the petition, certiorari should be granted.

Respectfully submitted,

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